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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

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No. 310

FRANK O. LOWDEN, JAMES E. GORMAN AND JOSEPH B. FLEMING, TRUSTEES OF THE ESTATE OF THE CHOCTAW, OKLAHOMA & GULF RAILROAD COMPANY,
Petitioners,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES AND BRIEF IN SUPPORT THEREOF.

M. L. BELL,
W. F. PETER,
THOMAS P. LITTLEPAGE,
W. R. BLEAKMORE,
ROBERT E. LEE,
Counsel for Petitioners.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES.

To The Honorable Harlan Fiske Stone, Chief Justice of the United States, and Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully show:

I.

Summary Statement of Matter Involved.

This is an action at law instituted by petitioners in the Court of Claims to recover money unlawfully exacted by the respondent in excess of the agreed contract price of

coal deposits in the segregated mineral area of the Choctaw and Chickasaw Nations purchased at public auction pursuant to the provisions of the Act of Congress of February 8, 1918 (40 Stat. 433), authorizing said sale (R. 1). This Act being of some length is attached hereto as an appendix. On May 5, 1941, the Court of Claims rendered its judgment denying recovery upon the merits and dismissing the petition (R. 73, 79, 81).

Petitioners' predecessor, the Choctaw, Oklahoma & Gulf Railroad Company (hereinafter referred to as the Railroad), was the lessee of several developed and undeveloped tracts of coal deposits in the segregated mineral area of the two Indian Tribes. These leases had more than ten years to run at the time the deposits embraced herein were sold at public auction. Each lease provided for the payment of production royalty for all coal produced and also for the payment of a certain amount each year as advance royalty; the advance royalty payments to be credited on production royalty should the lessee develop the tract covered and the production therefrom exceed the amount paid as advance royalty (R. 53, 54, 74).

On December 11, 1918, when the coal deposits were offered for sale at public auction, the Railroad had standing to its credit $20,078.96 advance royalties on its developed leases and $34,400.00 advance royalties on its undeveloped leases (R. 54-55).

With reference to the deposits on which there were leases, Section 4 of the Act of February 18, 1918 (40 Stat. 433) provided that such deposits should be sold subject to all rights of the lessee, that advance royalty paid by any lessee and standing to the credit of said lessee should be credited by the purchaser to the extent of the amount thereof and that no royalty should be paid by the lessee to the purchaser until the credit so given was exhausted at the rate of eight cents per ton. This section of the Act further pro-

vided that the lessee should have the preferential right to purchase the deposits embraced in any lease held by him by taking the same at the highest price offered by any responsible bidder at public auction at not less than the appraised value; and if any lessee became the purchaser of any coal deposits on any undeveloped lease owned by him, then one-half of the advance royalties paid by any lessee on such lease should be credited on the purchase price thereof, and the residue of advance royalties theretofore paid by any lessee should be credited to such lessee on account of any production of coal on any other lease which he may own and operate (R. 55-56, 74).

On September 24, 1918, the Secretary of the Interior promulgated rules governing the sale, the pertinent sections of which read as follows:

> "Section 7. The terms of the sale shall be 20% of the purchase price in cash at the time of the sale, and the remainder shall be paid in four equal annual payments from date of sale, whether or not any coal or asphalt is mined subsequent to the sale. Where mining operations are carried on a certain amount per ton for coal or asphalt mined shall be paid monthly to the Superintendent for the Five Civilized Tribes to be applied on the purchase price as provided by Section 13 of these regulations. All deferred payments shall bear interest at the rate of 5% per annum."
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> * * * * * * *
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> "Purchasers shall have the right to pay all of the purchase money or any deferred payment, or any portion thereof, at the time of the sale or at any time before the same is due, interest to be computed to date of receipt of payment" (R. 58).
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> * * * * * * *
>
> "Section 13. Until full and final payment is made for any tract, leased or unleased, sold under these regula-

tions, the purchaser shall pay, or cause to be paid to the Superintendent for the Five Civilized Tribes, monthly, 8 cents per ton for all coal mined (mine run), and 10 cents per ton for asphalt mined, such payments to be held by said Superintendent to be applied on the purchase price, and upon request of the purchaser may be applied in payment of any installment, when due. Any unused advance royalty to the credit of the lessee under existing leases, shall be paid by said Superintendent, when final payment of the purchase price is made, to the purchaser for the benefit of the lessee under the terms of the lease and the Act of Congress approved February 8, 1918; Provided, however, that if any lessee becomes the purchaser of any coal deposits on any undeveloped lease owned by him, then one-half of the advance royalties paid by any lessee on such lease shall be credited on the purchase price thereof, and any residue of advance royalties heretofore paid by any lessee shall be credited to such lessee on account of any production of coal on any other lease which he may own and operate.

"All royalty paid on coal or asphalt mined subsequent to the date of approval of the sale shall belong to the purchaser, subject to the requirement of a certain amount per ton, as above stated, to be paid to the Superintendent of the Five Civilized Tribes, to be applied on the purchase price, which is to protect the Choctaw and Chickasaw tribes from loss on account of coal removed in case the tract should be forfeited before final payment is made" (R. 59).

On October 10, 1918, a printed advertisement of the sale was issued by the Superintendent for the Five Civilized Tribes which set forth the terms thereof, as follows:

"Terms: Twenty per cent in cash at time of sale and the balance in four equal installments payable in one, two, three, and four years from date of sale, with interest at five per cent per annum on deferred payments. Purchasers can make full payment at time of sale or at

any time before the deferred installments become due'' (R. 60).

The Superintendent for the Five Civilized Tribes also issued an advertisement of the sale in printed pamphlet form which set out the terms thereof, as follows:

> ''Terms: Twenty per cent (20%) of the purchase price at the time of the sale, and the remainder in four equal annual installments, payable in one, two, three, and four years, respectively, from the date of sale. All deferred payments bear 5 per cent (5%) interest per annum from date of sale. All royalties on tracts now under lease, and on any lease made on unleased tracts subsequent to the sale and before final payment, must be paid to the Superintendent for the Five Civilized Tribes and be held by him and paid to the purchasers after full payment has been made or in annual installments in the discretion of the Secretary of the Interior.
>
> ''All sales made shall be upon the express conditions provided for in Section 4 of the Act of Congress approved February 20, 1918'' (R. 61).

At the public auction on December 11, 1918, the Railroad bid in all tracts on which it had leases, both developed and undeveloped. Twenty per cent of the purchase price was paid at the time and the remainder was agreed to be paid in four equal annual installments from the date of sale, the deferred payments to bear interest at the rate of five per cent per annum and to mature and become due at the expiration of four years after the date of sale (R. 55, 58, 60, 61).

The Railroad's bids were not approved by the Secretary of the Interior until August 29, 1919, and between that date and the date the tracts were sold at public auction the Railroad paid production royalties on coal mined from the developed tracts amounting to $35,193.14 (R. 62, 75).

All installments on the purchase price were timely paid in full (R. 62, 63, 64). The Railroad prior to and at the time

of making the final payment demanded and insisted that it be credited on the purchase price with: (1) All production royalties paid between December 11, 1918, and August 29, 1919, amounting to $20,112.39 [1]; (2) all advance royalties standing to its credit on the developed leases on December 11, 1918, amounting to $20,078.96; and (3) the balance of advance royalties standing to its credit on the undeveloped leases on December 11, 1918, amounting to $7,739.75 [2] (R. 55, 62, 65).

In making the final payment on December 11, 1922, the Railroad did so under written protest, demanding the allowance of the above credits and notifying the Superintendent for the Five Civilized Tribes not to disburse the payment in any manner, but to hold the entire payment in his care until such time as the rights of the parties had been finally determined. The Cashier and Special Disbursing Agent in the office of the Superintendent deposited the entire amount of this final payment in his Special Deposit Account with the Treasurer of the United States, termed "Trust Funds," where it now remains pending the final determination of the matters in controversy. This payment was not and has not been paid into the treasury of the United States to the credit of the Choctaws and Chickasaws (R. 64-65, 73).

The claims were finally rejected by the Interior Department on December 12, 1932 (R. 72). Thereafter, on June 27, 1935, the petitioners instituted this suit in the Court of Claims of the United States seeking recovery upon the above claims in the aggregate amount of $47,931.10 (R. 1,

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[1] At the direction of the Secretary, interest paid between the date of sale and date of approval was credited on the purchase price, thereby reducing this claim to $20,112.39 (R. 9, 63, 75).

[2] A portion of the advance royalties on the undeveloped leases was credited on the purchase price, thereby reducing this claim to $7,739.75 (R. 62, 63, 77).

78). On May 5, 1941, the Court of Claims decided that petitioners were not entitled to recover on the merits on their claims and rendered judgment dismissing their petition (R. 73, 79, 81).

II.

Reasons Relied On for the Allowance of the Writ.

1. The decision of the Court of Claims decides a question of substance relating to the construction of the Act of Congress, approved February 8, 1918 (40 Stat. 433), which has not been, but should be, settled by this Court.

2. The decision of the Court of Claims denying petitioners the right to recover the amount of production royalties paid between the date of sale and the date of approval is not in accord with the applicable decisions of this Court on the doctrine of relation. *United States* v. *Anderson,* 194 U. S. 394; *Weyershaeuser* v. *Hoyt,* 219 U. S. 380; *Knapp* v. *Alexander Co.,* 237 U. S. 162; *Lykins* v. *McGrath,* 184 U. S. 169; *Pickering* v. *Lomax,* 145 U. S. 310; *Anchor Oil Co.* v. *Gray,* 256 U. S. 519.

3. The decision of the Court of Claims in denying petitioners the right to recover the amount of the production royalties paid between the date of sale and the date of approval is in conflict with the unreported decision of the United States District Court for the Eastern District of Oklahoma in the case numbered and entitled on its docket, No. 4317 Equity, Condon National Bank of Coffeyville, Kansas, Trustee, plaintiff, *v.* McAlester-Edwards Coal Co., et al., defendants. A certified copy of the applicable parts of the report of the special master in that case and the decree of the court approving the same is on file with the Clerk of this Court.

4. This petition for writ of certiorari is presented under amended Rule 41 of the Revised Rules of this Court, dated March 25, 1940.

WHEREFORE, your petitioners pray that a writ of certiorari issue under the seal of this Court directed to the Court of Claims of the United States, commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Court of Claims of the United States had in the case numbered and entitled on its docket, No. 43074, Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees of the Estate of the Choctaw, Oklahoma & Gulf Railroad Company, Debtor, plaintiff, *v.* The United States of America, defendant, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said Court of Claims of the United States be reversed by the Court, and for such further relief as to this Court may seem proper.

Dated, July 25, 1941.

FRANK O. LOWDEN, JAMES E. GORMAN
and JOSEPH B. FLEMING,
Trustees of the Estate of the Choctaw,
Oklahoma & Gulf Railroad Company,
By M. L. BELL,
W. F. PETER,
THOMAS P. LITTLEPAGE,
W. R. BLEAKMORE,
ROBERT E. LEE,
Counsel for Petitioners.